

COMMISSION FOR THE PRESERVATION
OF WILD HORSES ET AL.

IBLA 94-115, 94-116, 94-120

Decided March 31, 1997

Appeal from the Decision of the District Manager, Elko District Office, Bureau of Land Management, to implement the Spruce-Pequot Area Gather Plan and associated Environmental Assessment BLM/EK/PL-93/037 and Petitions to Stay future gathers.

Appeals dismissed; Petitions denied.

1. Environmental Quality: Environmental Statements--
National Environmental Policy Act of 1969--Generally:
Rules of Practice: Appeals: Jurisdiction

The Board does not have jurisdiction to consider appeals of decisions approving or amending a resource management plan and cannot acquire jurisdiction until action to implement the plan is taken.

2. Appeals: Generally--Rules of Practice: Appeals:
Standing to Appeal

In order to establish standing to appeal under 43 C.F.R. § 4.410, an organization must show that it is a party to the case and that it has a legally cognizable interest that has been adversely affected by the decision appealed. Where an appellant has not participated before BLM during its consideration of the decision on appeal, it is not a party to the case, and the appeal properly is dismissed.

APPEARANCES: Catherine Barcomb, Executive Director, Commission for the Preservation of Wild Horses, for Appellant; Dawn Y. Lappin, Director, Wild Horses Organized Assistance, for Appellant; Allen T. Rutberg, Senior Scientist, Humane Society of the United States, for Appellant; Rodney Harris, District Manager, Elko District Office, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

The Commission for the Preservation of Wild Horses (CPWH), Wild Horses Organized Assistance (WHOA) and the Humane Society of the United States

(HSUS) appeal 1/ the October 14, 1993, Decision of the District Manager, Elko District Office, Bureau of Land Management (BLM), to conduct a wild horse gather from the Spruce-Pegup Herd Area and to remove all wild horses in checkerboard public-private land pattern areas, based on the Spruce-Pegup Area Wild Horse Gather Plan (Gather Plan) and associated Preliminary Environmental Assessment BLM/EK/PL-93/037 (Plan EA), which were prepared to implement an amendment to the Wells Resource Management Plan (RMP) in accordance with the Wild Free-Roaming Horses and Burros Act (the Act), as amended, 16 U.S.C. §§ 1331-1340 (1994) and implementing regulations in 43 C.F.R. Part 4700. Appellants also appeal 2/ the District Manager's determination that the October 14 Decision would be placed in full force and effect, and have requested a stay of the Decision with respect to future removals. The Board has, however, allowed the Decision to remain in effect.

The CPWH's and WHOA's Notices of Appeal on page 1 stated that their "administrative protest to the Wells Resource Management Plan Wild Horse Amendment and Decision Record was denied based upon the 1983 IBLA Decision.

[Citation not provided.]" The CPWH and WHOA also recited that they respectively have "an established responsibility by law and affected interest status concerning the management of wild horses within the Wells Resource Area." Id. The HSUS' Notice of Appeal on page 1 states that it has "developed a longstanding history of commenting on the treatment and management of wild horses by [BLM]," which, coupled with a recent pilot project, constitutes a "firmly established interest in the management of wild horses within the Wells Resource Area." Id. All three Appellants assert the following:

Management actions taken and to be taken by this Final Decision, Interim Spruce Allotment Management Plan and Strategic Plan for management of Wild Horses and Burros on Public Lands will cause irreversible adverse impacts to the Pegup Wild Horse Herd. Pursuant to our concerns [we] must appeal the implementation of this amendment through this Final Decision.

Id. (Emphasis added.)

Briefly, the antecedents of the October 14, 1993, Decision are as follows. The Decision adopts a specific activity to implement the RMP and its underlying Environmental Impact Statement (EIS) (INT DEIS 83-30),

1/ Appellants filed virtually identical Notices of Appeal which set forth their Statements of Reasons. The CPWH's appeal, dated Nov. 12, 1993, was docketed as IBLA 94-115; WHOA's appeal, dated Nov. 12, 1993, was docketed as IBLA 94-116; and HSUS' appeal, dated Nov. 15, 1993, was docketed as IBLA 94-120. The three appeals are hereby consolidated.

2/ Unless otherwise noted, all citations to Appellants' Notices of Appeals specifically refer to the document filed by CPWH. Because the three Notices are virtually identical, the minor differences in text should not affect the accuracy of our citations.

which were approved as final by Record of Decision (ROD) dated July 16, 1985. The amendment to the RMP was proposed "to establish wild horse HMAs [herd management areas], solve the problems with checkerboard land pattern conflicts, identify habitat requirements and management practices, establish initial herd size, develop factors for adjustments in herd size, identify constraints on other resources, and combine herd areas for the purpose of improving management of wild horses." Draft Wild Horse Amendment and Environmental Assessment dated June 1, 1992. The Draft Wild Horse Amendment to the RMP (Amendment) and its supporting Environmental Assessment (Amendment EA) (jointly referred to as Amendment/Amendment EA) were transmitted to a variety of public and private agencies and individuals for review and comment. The record shows CPWH and WHOA were provided copies. The Amendment/Amendment EA was issued as proposed on October 2, 1992 (BLM-EK-PT-93-001-1610). According to the record, all three Appellants were sent copies of the proposed Amendment/Amendment EA. In due course, the Approved Amendment, supporting Amendment EA, Finding of No Significant Impact, and ROD were signed by the State Director on August 2, 1993.

By letter dated August 2, 1993, the District Manager also transmitted for public review and written comment within 30 days of the date thereof a draft Gather Plan and supporting Plan EA to implement the Amendment/Amendment EA. In addition, the letter constituted BLM's Notice of Intent to Gather Wild Horses from Public Land "no sooner than 28 days from the date of [the] letter." ^{3/} The record indicates all three Appellants were sent copies, but they did not submit written comments. Indeed, no comments were received from any person or organization and the draft Gather Plan and Preliminary Plan EA were adopted as final.

On October 14, 1993, the District Manager issued notice that the Spruce-Pequop Gather Plan would be placed in full force and effect (FF&E).

In addition, the FF&E noted the lack of comments on the draft Gather Plan and Plan. The record shows Appellant WHOA received the FF&E by certified mail; the record strongly suggests that a copy also was sent to Appellant CPWH by certified mail. According to the case chronology, other interested persons and groups were sent copies of the FF&E by regular mail. The record includes a mailing list that is attached to the October 14 FF&E, and HSUS is on that list.

The steps in the process by which RMP's are developed and finalized, including the requirements governing public participation and review, are set forth in 43 C.F.R. Part 1600. Meaningful public participation is mandated by the National Environmental Policy Act of 1969, 42 U.S.C. § 4321

^{3/} Although the Notice arguably suggests the gather would be conducted before the end of the 30-day comment period, from the record it appears that the first gather, from the Toano Herd Area, did not occur until Oct. 18, 1993, and the first of the Pequop horses were captured on Oct. 22, 1993. By Oct. 26, 1993, the gather in the Spruce-Pequop was completed.

(1994), implemented by Departmental regulation at 43 C.F.R. § 1610.2. Public involvement in the development of RMP's and amendments and revisions thereto is specifically required at the outset of the planning process in identifying planning issues, 43 C.F.R. § 1610.4-1; during review of the proposed planning criteria, 43 C.F.R. § 1610.4-2; upon publication of the draft RMP and draft EIS, 43 C.F.R. § 1610.4-7; and upon publication of the proposed RMP and final EIS, which triggers the opportunity for protest, 43 C.F.R. §§ 1610.4-8 and 1610.5-1(b). In the case of RMP amendments, the provisions of 43 C.F.R. § 1610.5-5 require compliance with 43 C.F.R. § 1610.2; and in the case of revisions, 43 C.F.R. § 1610.5-6 likewise requires compliance with 43 C.F.R. § 1610.2.

The applicable regulation provides that "[a]ny person who participated in the planning process and has an interest which is or may be adversely affected by the approval or amendment of an [RMP] may protest such approval or amendment. A protest may raise only those issues which were submitted for the record during the planning process." 43 C.F.R. § 1610.5-2. That protest must be filed with the State Director within 30 days of publication of notice of receipt of a final EIS in the Federal Register by the U.S. Environmental Protection Agency, as required by 43 C.F.R. § 1610.5-1(b). The public has a right to review and comment on any significant change that occurs as a result of a protest. 43 C.F.R. § 1610.5-1(b). Finally, after an RMP is approved or amended, "[a]ny person adversely affected by a specific action being proposed to implement some portion of a[n RMP] or amendment may appeal such action pursuant to 43 C.F.R. § 4.400 at the time the action is proposed for implementation." 43 C.F.R. § 1610.5-3(b).

[1] Thus, as we have observed in prior decisions, the Board does not have jurisdiction to consider appeals of decisions approving or amending a resource management plan and cannot acquire jurisdiction until action to implement the plan is taken. Deschutes River Landowners Committee, 136 IBLA 105, 107 n.3 (1996), and cases cited therein. It follows that the only action now before the Board is the Plan EA and Gather Plan for the Spruce-Pequot HMA, since Appellants could only protest the decision to approve the RMP or Wild Horse Amendment/Amendment EA to the State Director. Appellants' Notices of Appeal acknowledge as much, as demonstrated by the excerpts quoted above on page 2. For that reason, Appellants' many arguments regarding the RMP, the Wild Horse Amendment/Amendment EA, and other planning decisions and documents must be dismissed, and we turn to consideration of the Appeals as they relate to the specific action of gathering wild horses in the Spruce-Pequot HMA.

Appellants attack BLM's statement that no comments on the Plan EA and Gather Plan were received, the absence of which allowed the adoption of the Plan EA and Gather Plan as drafted. They refer to a meeting on or about August 31, 1993, among CPWH, WHOA, the Associate State Director and other BLM representatives, at which Appellants contend they verbally commented upon and made recommendations regarding the Plan EA (styled by Appellants as the "draft" EA) and Gather Plan. The HSUS did not attend the meeting,

but now asserts that CPWH and WHOA "met on their own behalf and on behalf of the HSUS." ^{4/} (HSUS Notice of Appeal at 2.)

Appellants CPWH and WHOA argue that their issues and recommendations "were not recognized in the final environmental assessment and gather plan." (Notice of Appeal at 1.) Appellants thus argue that the August 31 meeting should be accepted as the written comment called for in the District Manager's covering letter of August 2, 1993. They further complain that they were given no opportunity to review and comment upon the final Gather Plan and Plan EA before the Plan was implemented. However, the record plainly shows that Appellants failed to avail themselves of the opportunity to comment on the draft Gather Plan and Plan EA within the time specified.

[2] In order to establish standing to appeal under 43 C.F.R. § 4.410, it is essential that an organization show that it is a party to a case and that a legally cognizable interest has been adversely affected by the appealed decision. Glenn Grenke v. BLM, 122 IBLA 123 (1992). As a general matter, where an appellant has not participated before BLM during its consideration of the decision on appeal, it is not a party to the case, and the appeal is properly dismissed. National Wildlife Federation, 126 IBLA 48, 52 (1993); The Wilderness Society, 110 IBLA 67, 72 (1989).

We necessarily reject Appellants' assertion that the discussion at the August 31 meeting was intended to constitute the formal written comment invited by the District Manager's August 2, 1993, letter. Apart from the fact that the transmittal letter specifically required written comments, BLM contends the purpose of the meeting was quite different. According to BLM, the parties met to discuss utilization of key forage species by wild horses in combined winter use areas prior to livestock turnout and the fact

^{4/} Although this contention is irrelevant in light of our disposition, we note that an unsupported assertion that HSUS was represented by CPWH and WHOA is not sufficient to confer the status of party. It must be shown that the other Appellants in fact were authorized to represent HSUS. It is significant that neither CPWH nor WHOA asserts that it represented HSUS at the meeting, and evidence or a writing showing the nature and extent of CPWH's and/or WHOA's alleged authority to represent HSUS has not been proffered. Moreover, BLM contends that at the meeting Appellants never even advised that CPWH and WHOA represented HSUS. An appeal will be dismissed when the purported representatives do not meet the criteria set forth in 43 C.F.R. § 1.3(b) allowing practice before the Department on its behalf. As Appellants have not shown that CPWH or WHOA are admitted to practice under a prior Departmental regulation; are members of the bar in good standing; or are members, officers or full-time employees of HSUS, they are not permitted to practice before the Department on behalf of HSUS in this matter. 43 C.F.R. § 1.3(b). See Audubon Society of Portland, 128 IBLA 370, 373 (1994).

that the first round of gathers to attain initial herd size would be based on the Amendment, whereas the appropriate management level for wild horses and any subsequent gathers would be based upon multiple use decisions and allotment evaluation. (BLM Response at 2; see also Meeting Notes, Supplemental Information Section of Appeal File.) The BLM asserts that the issues raised by Appellants were explained or addressed at the meeting to Appellants' apparent satisfaction. (BLM Response at 2.) Moreover, according to the file notes, at the meeting BLM pointedly inquired whether Appellants intended to submit written comments, and Appellants replied that they would not. Meeting Notes, Supplemental Information section of Appeal File. In the absence of any evidence to the contrary, we accept BLM's characterization of the meeting, and we reject Appellants' attempt to characterize the meeting as a legitimate substitute for the formal written comment requested by the August 2, 1993, transmittal letter.

Appellants have presented numerous questions, allegations and arguments regarding the Interim Spruce Allotment Management Plan and the manner in which it was developed and executed, the status of an unidentified temporary livestock license and the Strategic Plan for Management of Wild Horses and Burros on Public Lands. It is apparent from Appellants' detailed Statement of Reasons for appeal that they in fact are attempting to appeal actions over which the Board lacks jurisdiction, actions regarding which the time to protest has long since expired, actions which may be subject to pending protests, or matters as to which they lack standing to appeal. Since, however, Appellants did not submit written comments within the time provided, they did not participate in the decision supporting the specific implementation activity that is the subject of the October 14, 1993, Decision. They thus are not parties to the case, and therefore they lack standing to appeal the adoption and implementation of the Plan EA and Gather Plan as proposed. In light of our disposition of this matter, the Petitions for a Stay are denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Appeals are dismissed and Appellants' Petitions for a Stay are denied.

T. Britt Price
Administrative Judge

I concur:

James L. Burski
Administrative Judge

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